

In the Matter of John W. Kelly, County of Gloucester
DOP Docket No. 2005-4962
(Merit System Board, decided May 24, 2006)

The appeal of John W. Kelly, a County Correction Officer with the County of Gloucester, of his removal effective May 15, 2005, on charges, was heard by Administrative Law Judge (ALJ) Ana C. Viscomi, who rendered her initial decision on March 13, 2006. Exceptions were filed on behalf of the appellant, and cross-exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on May 24, 2006, accepted and adopted the Findings of Fact and Conclusions as contained in the attached initial decision and the recommendation that the removal be upheld.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee. Specifically, the appointing authority asserted that the appellant tested positive for the use of marijuana. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that, on or about February 18, 2005, the appellant's juvenile daughter ran away from the home she shared with the appellant. He located his daughter at her friend's house the following day, and he contacted the West Deptford Police Department for assistance when his daughter would not leave the house. At the hearing, Police Officer Richard Penney testified that he was the first officer to arrive at the scene. He entered the home and spoke with the appellant's daughter. When she was advised that she would have to return home with the appellant, the daughter expressed that she did not wish to do so because the appellant was "an alcoholic, used marijuana and abused her." Police Sergeant Samuel DiSimone then arrived at the scene. DiSimone also conversed with the appellant's daughter, and he testified that she repeated the accusations that the appellant was an alcoholic and used marijuana. DiSimone and Penney both related that they then went outside the house to speak with the appellant. When DiSimone asked the appellant about his daughter's allegations, he denied being an alcoholic but admitted to being a "social drinker." When pressed regarding the claim that he smoked marijuana, the appellant responded that "he had a problem he was working on" and requested that he and the officers "keep it to [them]selves."

In light of the statements the appellant provided to Penney and DiSimone and the resultant reasonable suspicion that he was a drug user, he was required to submit to a drug test. Dr. Gerald Vernon, a certified medical review officer, administered the appellant's drug test. He testified that he collected the appellant's urine sample utilizing specimen cups supplied by LabCorp, and he did not offer the appellant an opportunity to provide a second sample. A technician wrote the appellant's name on the specimen, and the appellant signed the requisite chain of custody form. Vernon indicated that a preliminary test was performed, which proved positive for marijuana, but the sample was forwarded to LabCorp for confirmation. Vernon was unsure of the precise procedures utilized to test the sample once it arrived at LabCorp. Although Vernon did not have the appellant fill out a form listing any medications he was using, he did question the appellant on this topic. None of the reported medications were of concern to Vernon relative to the drug test. Following testing at LabCorp, the appellant's sample again proved positive for the presence of marijuana.

At the hearing at the OAL, the appellant challenged the admissibility of the drug test results on procedural grounds. Specifically, he pointed to the failure to prepare a written report documenting the basis for reasonable suspicion, the failure to utilize the State Toxicology Laboratory for the test, the failure to afford him the opportunity to provide a split sample, and the failure to utilize specimen collection equipment approved by the State Toxicology Laboratory. The appellant asserted that these procedures deviated from the Attorney General's Law Enforcement Drug Testing Policy (AG Guidelines) and the Sheriff's General Orders regarding drug testing (County Policy).¹ However, the ALJ found that the appellant admitted to using marijuana, as evidenced by the "competent, credible" testimony presented by Penney and DiSimone, and this admission clearly provided reasonable suspicion to administer a drug test. The ALJ further found that the results of the drug test were reliable, notwithstanding the deviations from the County Policy. Based on these findings, the ALJ recommended that the charges and penalty of removal be upheld.

In his exceptions to the ALJ's initial decision, the appellant argues that the drug test administered to him must be voided, since the appointing authority failed to adhere to the procedures outlined in the County Policy. Specifically, the appellant emphasizes that, prior to administering a drug test based on reasonable suspicion, a written report must be prepared to document the basis for the reasonable suspicion, and the report must be reviewed by the County Prosecutor or the Sheriff. He notes that there is no dispute that there was no written report in

¹ There is much debate in the record concerning the applicability of the AG Guidelines to the instant matter. The ALJ correctly found that the AG Guidelines do not apply to County Correction Officers. See *In the Matter of Danielle Lewis*, Docket No. A-2091-99T1 (App. Div. April 20, 2001). However, the County is required to adhere to its own drug testing policy, which in this case, is identical to the AG Guidelines.

his case. In addition, the County Policy requires completion of a written medical questionnaire, listing all medications taken by the employee, but this was not done. The County Policy also provides that “[u]nder no circumstances may a specimen be collected and submitted for analysis in a specimen container that has not been approved by the State Toxicology Laboratory;” however, his specimen was collected in a container provided by LabCorp. Next, the appellant asserts that the County Policy requires the appointing authority to provide him with the option of providing a second sample, which was not done. Finally, the appellant maintains that the County Policy mandates that all samples be sent to the State Toxicology Laboratory for analysis. In his case, the sample was tested by LabCorp. Based on the appointing authority’s failure to strictly adhere to the procedures outlined in the County Policy, the appellant contends that his drug test violated his right to fundamental fairness and due process, mandating the nullification of the results and the dismissal of the instant disciplinary charges.

In its cross-exceptions, the appointing authority asserts that the minor procedural violations do not demonstrate that the appellant’s drug test was invalid. The appointing authority emphasizes that the appellant admitted to drug use, which certainly provided it with reasonable suspicion to conduct a drug test, regardless of whether a written report to that effect was prepared. It also maintains that there is no evidence to suggest that the use of a LabCorp container and laboratory to test the sample affected the reliability of the result.

The Board is not persuaded by the appellant’s exceptions. It is recognized that there is no dispute that the appointing authority did not strictly adhere to its own policies concerning employee drug testing. However, it does not follow that every technical deviation from the County Policy warrants the nullification of the results of a drug test. *See In the Matter of Bruce Norman*, Docket No. A-5633-03T1 (App. Div. January 26, 2006), *cert. denied*, __ N.J. __ (2006); *In the Matter of Mario Lalama*, 343 N.J. Super. 560 (App. Div. 2001) (Despite flaws in the chain of custody, a drug test is still valid where the record shows a “reasonable probability” that the integrity of the sample has been maintained). The County Policy itself does not require voiding the results of a drug test where its procedural requirements are not strictly adhered to. In the instant matter, while no written report documenting the basis for the appointing authority’s reasonable suspicion was prepared, it is beyond dispute that the appellant’s own admission formed a valid basis for administering a drug test. *See also Edward Cruz, Jr. v. County of Hudson*, Docket No. A-4646-02T3 (App. Div. May 20, 2004) (Appellate Division upheld the removal of a County Correction Officer who refused to submit to a reasonable suspicion drug test, despite the County’s failure to prepare a written report for the review of the County Prosecutor documenting the basis of its reasonable suspicion). Here, the appellant does not argue that his admission did not support a finding of reasonable suspicion; rather, he relies solely on the appointing authority’s failure to document in writing that his admission led to its decision to administer a drug test. Moreover, with

regard to the remaining procedural violations cited by the appellant, he has provided no arguments or evidence to even suggest that the failure to utilize an approved specimen collection container or the failure to utilize the State Toxicology Laboratory for testing impacted the results of his test. Likewise, he does not even allege that, had he completed a written medical questionnaire, his answers would have differed from those he provided orally to Vernon, or that any of the medications he may have taken would have altered his test results. Finally, the failure to offer the opportunity to provide a second sample is not fatal where, as here, there is absolutely no evidence that the results of the appellant's drug test were inaccurate.² In the instant matter, the appellant has not denied drug use. In fact, based on the credible testimony of two sworn law enforcement officers, he admitted to "a problem" with marijuana. The appellant did not testify at the hearing to dispute that he made this remark or to deny the use of marijuana. Rather, the appellant elected to present only one witness, a union official who did not provide any substantive testimony.

Therefore, the Board concludes that there were no fatal flaws in the appointing authority's drug testing procedures, and the record contains ample evidence to support a reasonable probability that the integrity of the appellant's sample was maintained, despite flaws in the testing procedure. Accordingly, while the Board does not in any way condone the County's failure to adhere to the County Policy, the Board agrees with the ALJ's conclusion that the appointing authority has proven the charges against the appellant. Nevertheless, the Board strongly urges the appointing authority to strictly comply with its drug testing procedures in the future.

With regard to the penalty, it is clear that drug usage cannot be tolerated in a law enforcement officer. In imposing a penalty, the Board, in addition to considering the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty based on the egregious nature of the offense and the fact that the appellant, as a law enforcement officer, is held to a higher standard than other public employees. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). Accordingly, the Board

² The Board notes that LabCorp performed an initial screening of the appellant's sample, utilizing a cutoff level of 50 ng/mL, and the appellant's sample proved positive. To confirm, LabCorp used a more precise testing process, gas chromatography/mass spectrometry (GC/MS) with a cutoff level of 15 ng/mL. The GC/MS test demonstrated a level of 239 ng/mL in the appellant's sample. *See Exhibit R-3.*

concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Merit System Board finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Board affirms that action and dismisses the appeal of John W. Kelly.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.